

**IN THE UNITED STATES DISTRICT COURT  
FOR THE SOUTHERN DISTRICT OF GEORGIA  
WAYCROSS DIVISION**

NELSON FERNANDEZ AVILES,

Petitioner,

v.

WARDEN, FOLKSTON ICE FACILITY,

Respondent.

CIVIL ACTION NO.: 5:25-cv-73

**REPORT AND RECOMMENDATION**

Petitioner Nelson Aviles (“Aviles”) has failed to comply with the Court’s Orders and Local Rules. Doc. 8; Local R. 11.1. As explained in further detail below, I **RECOMMEND** the Court **GRANT as unopposed** Respondent’s Motion to Dismiss, **DISMISS without prejudice** Aviles’s 28 U.S.C. § 2241 Petition for Writ of Habeas Corpus for failure to follow the Court’s Orders and Local Rules, **DIRECT** the Clerk of Court to **CLOSE** this case and enter the appropriate judgment of dismissal, and **DENY** Aviles leave to appeal *in forma pauperis*.<sup>1</sup>

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<sup>1</sup> A “district court can only dismiss an action on its own motion as long as the procedure employed is fair . . . . To employ fair procedure, a district court must generally provide the plaintiff with notice of its intent to dismiss or an opportunity to respond.” Tazoe v. Airbus S.A.S., 631 F.3d 1321, 1336 (11th Cir. 2011) (citations and internal quotation marks omitted). A magistrate judge’s Report and Recommendation provides such notice and opportunity to respond. See Shivers v. Int’l Bhd. of Elec. Workers Local Union, 349, 262 F. App’x 121, 125, 127 (11th Cir. 2008) (indicating a party has notice of a district court’s intent to sua sponte grant summary judgment where a magistrate judge issues a report recommending the sua sponte granting of summary judgment); Anderson v. Dunbar Armored, Inc., 678 F. Supp. 2d 1280, 1296 (N.D. Ga. 2009) (noting report and recommendation served as notice claims would be sua sponte dismissed). This Report and Recommendation constitutes fair notice to Aviles his suit is due to be dismissed. As indicated below, Aviles will have the opportunity to present his objections to this finding, and the presiding district judge will review de novo properly submitted objections. See 28 U.S.C. § 636(b)(1); Fed. R. Civ. P. 72; see also Glover v. Williams, No. 1:12-CV-3562, 2012 WL 5930633, at \*1 (N.D. Ga. Oct. 18, 2012) (explaining magistrate judge’s report and recommendation constituted adequate notice and petitioner’s opportunity to file objections provided a reasonable opportunity to respond).

## BACKGROUND

Aviles filed his Petition with the District Court for the Middle District of Georgia on June 2, 2025. Doc. 1. That court transferred Aviles's Petition to this District on July 23, 2025. Doc. 5. I then granted Aviles's motion for leave to proceed *in forma pauperis* and directed service of Aviles's Petition by Order dated July 25, 2025. Docs 8, 9. In that Order, I advised Aviles he is to immediately inform the Court in writing of any change in address and his failure to do so would result in dismissal of his case. Doc. 9 at 2; see also Local R. 11.1 ("Each . . . pro se litigant has a continuing obligation to apprise the Court of any address change.")). The Court granted Respondent's motion for extension of time to respond to Aviles's Petition on September 2, 2025. Doc. 13. This mailing was returned as undeliverable, with the notations: "No Longer Here" and "Return to Sender, Not Deliverable as Addressed, Unable to Forward." Doc. 16 at 1. Respondent filed a Motion to Dismiss on September 8, 2025. Doc. 14.

After the Court's mailing was returned as undeliverable and Aviles had failed to file a timely response to the Motion to Dismiss, the Court issued a show cause Order on October 7, 2025. Doc. 17. In this Order, I directed Plaintiff to respond to the Motion to Dismiss on or before October 17, 2025, and to notify the Court of any change in his address. The Court advised Aviles his failure to respond to the Court's Order or the Motion to Dismiss would result in the dismissal of his cause of action. Id. This mailing, too, was returned as undeliverable, with the notations: "No Longer Here" and "Return to Sender, Not Deliverable as Addressed, Unable to Forward." Doc. 18 at 1.

## DISCUSSION

The Court must now determine how to address Aviles's failure to comply with this Court's Orders and Local Rules. For the reasons set forth below, I **RECOMMEND** the Court

**GRANT as unopposed** Respondent’s Motion to Dismiss and **DISMISS without prejudice**

Aviles’s Petition. I also **RECOMMEND** the Court **DIRECT** the Clerk of Court to **CLOSE** this case and enter the appropriate judgment of dismissal and **DENY** Aviles leave to appeal *in forma pauperis*.

#### **I. Dismissal for Failure to Follow This Court’s Orders and Local Rules**

A district court may dismiss a petitioner’s claims for failure to prosecute pursuant to Federal Rule of Civil Procedure 41(b) and the court’s inherent authority to manage its docket. Link v. Wabash R.R. Co., 370 U.S. 626 (1962);<sup>2</sup> Coleman v. St. Lucie Cnty. Jail, 433 F. App’x 716, 718 (11th Cir. 2011) (citing Fed. R. Civ. P. 41(b) and Betty K Agencies, Ltd. v. M/V MONADA, 432 F.3d 1333, 1337 (11th Cir. 2005)). In particular, Rule 41(b) allows for the involuntary dismissal of a petitioner’s claims where he has failed to prosecute those claims, comply with the Federal Rules of Civil Procedure or local rules, or follow a court order. Fed. R. Civ. P. 41(b); see also Coleman, 433 F. App’x at 718; Sanders v. Barrett, No. 05-12660, 2005 WL 2640979, at \*1 (11th Cir. Oct. 17, 2005) (citing Kilgo v. Ricks, 983 F.2d 189, 192 (11th Cir. 1993)); cf. Local R. 41.1(b) (“[T]he assigned Judge may, after notice to counsel of record, *sua sponte* . . . dismiss any action for want of prosecution, with or without prejudice[,] . . . [based on] willful disobedience or neglect of any order of the Court.” (emphasis omitted)). Additionally, a district court’s “power to dismiss is an inherent aspect of its authority to enforce its orders and ensure prompt disposition of lawsuits.” Brown v. Tallahassee Police Dep’t, 205 F. App’x 802, 802 (11th Cir. 2006) (quoting Jones v. Graham, 709 F.2d 1457, 1458 (11th Cir. 1983)).

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<sup>2</sup> In Wabash, the Court held a trial court may dismiss an action for failure to prosecute “even without affording notice of its intention to do so.” 370 U.S. at 633. However, in this case, Aviles was notified of the consequences of failing to respond to this Court’s Orders and Local Rules. Docs. 8, 9, 17; Local R. 11.1.

It is true dismissal with prejudice for failure to prosecute is a “sanction . . . to be utilized only in extreme situations” and requires a court to “(1) conclud[e] a clear record of delay or willful contempt exists; and (2) mak[e] an implicit or explicit finding that lesser sanctions would not suffice.” Thomas v. Montgomery Cnty. Bd. of Educ., 170 F. App’x 623, 625–26 (11th Cir. 2006) (quoting Morewitz v. West of Eng. Ship Owners Mut. Prot. & Indem. Ass’n (Lux.), 62 F.3d 1356, 1366 (11th Cir. 1995)); see also Taylor v. Spaziano, 251 F. App’x 616, 619 (11th Cir. 2007) (citing Morewitz, 62 F.3d at 1366). By contrast, dismissal *without* prejudice for failure to prosecute is not an adjudication on the merits, and, therefore, courts are afforded greater discretion in dismissing claims in this manner. Taylor, 251 F. App’x at 619; see also Coleman, 433 F. App’x at 719; Brown, 205 F. App’x at 802–03.

While the Court exercises its discretion to dismiss cases with caution, dismissal of this action without prejudice is warranted. See Coleman, 433 F. App’x at 719 (upholding dismissal without prejudice for failure to prosecute, where plaintiff did not respond to court order to supply defendant’s current address for purpose of service); Brown, 205 F. App’x at 802–03 (upholding dismissal without prejudice for failure to prosecute, where plaintiff failed to follow court order to file amended complaint and court had informed plaintiff non-compliance could lead to dismissal).

Aviles failed to follow this Court’s Orders or Local Rules, despite having ample opportunity to do so and being notified of the consequences of his failure to do so. Thus, the Court should **DISMISS without prejudice** Aviles’s Petition. Doc. 1.

## **II. Leave to Appeal *in Forma Pauperis***

The Court should also deny Aviles leave to appeal *in forma pauperis*. Though Aviles has not yet filed a notice of appeal, it would be appropriate to address that issue in the Court’s order

of dismissal. See Fed. R. App. P. 24(a)(3) (noting trial court may certify appeal is not taken in good faith “before or after the notice of appeal is filed”).

An appeal cannot be taken *in forma pauperis* if the trial court certifies, either before or after the notice of appeal is filed, the appeal is not taken in good faith. 28 U.S.C. § 1915(a)(3); Fed. R. App. P. 24(a)(3). Good faith in this context must be judged by an objective standard. Busch v. County of Volusia, 189 F.R.D. 687, 691 (M.D. Fla. 1999). A party does not proceed in good faith when he seeks to advance a frivolous claim or argument. See Coppedge v. United States, 369 U.S. 438, 445 (1962). A claim or argument is frivolous when it appears the factual allegations are clearly baseless or the legal theories are indisputably meritless. Neitzke v. Williams, 490 U.S. 319, 327 (1989); Carroll v. Gross, 984 F.2d 392, 393 (11th Cir. 1993). Thus, a claim is frivolous and not brought in good faith if it is “without arguable merit either in law or fact.” Moore v. Bargstedt, 203 F. App’x 321, 323 (11th Cir. 2006) (quoting Bilal v. Driver, 251 F.3d 1346, 1349 (11th Cir. 2001)); see also Brown v. United States, Nos. 407CV085, 403CR001, 2009 WL 307872, at \*1–2 (S.D. Ga. Feb. 9, 2009).

Based on the above analysis of Aviles’s failure to follow this Court’s Orders and Local Rules, there are no non-frivolous issues to raise on appeal, and an appeal would not be taken in good faith. Thus, the Court should **DENY** Aviles *in forma pauperis* status on appeal.

### CONCLUSION

Based on the foregoing, I **RECOMMEND** the Court **GRANT as unopposed** Respondent’s Motion to Dismiss, **DISMISS without prejudice** Aviles’s Petition for failure to follow the Court’s Orders and Local Rules, **DIRECT** the Clerk of Court to **CLOSE** this case and enter the appropriate judgment of dismissal, and **DENY** Aviles leave to appeal *in forma pauperis*.

Any objections to this Report and Recommendation shall be filed within 14 days of today's date. Objections shall be specific and in writing. Any objection that the Magistrate Judge failed to address a contention raised in the Complaint must be included. Failure to file timely, written objections will bar any later challenge or review of the Magistrate Judge's factual findings and legal conclusions. 28 U.S.C. § 636(b)(1)(C); Harrigan v. Metro Dade Police Dep't Station #4, 977 F.3d 1185, 1192–93 (11th Cir. 2020). To be clear, a party waives all rights to challenge the Magistrate Judge's factual findings and legal conclusions on appeal by failing to file timely, written objections. Harrigan, 977 F.3d at 1192–93; 11th Cir. R. 3-1. A copy of the objections must be served upon all other parties to the action.

Upon receipt of objections meeting the specificity requirement set out above, a United States District Judge will make a de novo determination of those portions of the report, proposed findings, or recommendation to which objection is made and may accept, reject, or modify, in whole or in part, the findings or recommendations made herein. Objections not meeting the specificity requirement set out above will not be considered by the District Judge. A party may not appeal a Magistrate Judge's report and recommendation directly to the United States Court of Appeals for the Eleventh Circuit. Appeals may be made only from a final judgment entered by or at the direction of a District Judge.

**SO REPORTED and RECOMMENDED**, this 21st day of October, 2025.

A handwritten signature in blue ink, appearing to read 'B. Cheesbro', is written over a horizontal line.

BENJAMIN W. CHEESBRO  
UNITED STATES MAGISTRATE JUDGE  
SOUTHERN DISTRICT OF GEORGIA